MOTION FILED
NOV 15 1979

Supreme Court, U. S.
FILED
JAN 14 1980
JR., CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-134.

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,
APPELLANT,

v.

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
APPELLEE.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

Motion of New England Legal Foundation for Leave to File Brief as Amicus Curiae, and Brief of Amicus Curiae New England Legal Foundation in Support of Appellant.

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Table of Contents.

Motion of New England Legal Foundation for Leave to File Brief as Amicus Curiae 1

Brief of Amicus Curiae New England Legal Foundation in Support of Appellant 4

Introductory Statement 4

Questions Presented 5

Summary of Argument 6

Argument 6

I. The Right to Receive Information 6

II. The Commission's Bill Insert Ban Is Unconstitutionally Vague 14

III. The Commission's Bill Insert Ban Is a Content Related Regulation 18

Conclusion 22

Table of Authorities Cited.

CASES.

Bates v. Little Rock, 361 U.S. 516 (1960) 16

Buckley v. Valeo, 424 U.S. 1 (1976) 9, 14, 16

C & C Plywood Corp. v. Hanson, 420 F. Supp. 1254 (D. Mont. 1976), appeal docketed, No. 76-3118, 9th Cir. 9n.

Elrod v. Burns, 427 U.S. 347 (1976) 16

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 2, 9, 10, 13, 15

Garrison v. Louisiana, 379 U.S. 64 (1964) 8-9, 14

Grayned v. City of Rockford, 408 U.S. 104 (1972) 14, 15

Griswold v. Connecticut, 381 U.S. 479 (1965) 7
Kovacs v. Cooper, 336 U.S. 77 (1949) 22
Lamont v. Postmaster General, 381 U.S. 301 (1965) 7n.
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 21n.
Minarcini v. Strongsville City School District, 541 F. 2d 577 (6th Cir. 1976) 7n.
N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 16
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 7-8
Pacific Gas and Electric Company v. Berkeley, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976) 9n.
Pickering v. Board of Education, 391 U.S. 563 (1968) 8, 10
Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972) 20, 21
Procunier v. Martinez, 416 U.S. 396 (1974) 8n.
Public Utilities Commission v. Pollak, 343 U.S. 451 (1952) 21n.
Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969) 8
Roth v. United States, 354 U.S. 476 (1957) 21
Smith v. California, 361 U.S. 147 (1959) 15
Stanley v. Georgia, 394 U.S. 557 (1969) 7n.
Thornhill v. Alabama, 310 U.S. 88 (1940) 13
Vanasco v. Schwartz, 401 F. Supp. 87 (S.D. N.Y. 1975), aff'd, 423 U.S. 1041 (1976) 9
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 7, 11, 12, 20n.

Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) 20

CONSTITUTIONAL PROVISIONS.

United States Constitution:
First Amendment 2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 21, 22, 23
Fourteenth Amendment 14, 18

RULES.

Rules of the Supreme Court, Rule 42 1

MISCELLANEOUS.

Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 43 Colum. L. Rev. 960 (1953) 21n.
Black, Hugo LaFayette, A Constitutional Faith (Alfred A. Knopf, New York 1968) 22n.
New England River Basins Commission, New England Dependence on Petroleum Products (1976) 11n.
Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions, 46 U. Chi. L. Rev. 81 (1978) 19n.

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Motion of New England Legal Foundation for Leave to File Brief as Amicus Curiae.

Pursuant to Rule 42 of the Rules of the Supreme Court, New England Legal Foundation moves the Court for leave to file its brief as amicus curiae bound with this motion in support of appellant.

New England Legal Foundation has the consent of counsel for appellant and counsel for appellee to the filing of this brief. Copies of the letters of counsel granting consent are on file with the Clerk of Court.

New England Legal Foundation (NELF) is a non-profit, tax-exempt corporation, organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on matters affecting the broad public

interest. Policy for NELF is set by a board of directors composed of New England citizens, the majority of whom are attorneys. The board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

New England Legal Foundation participated in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) as counsel for amicus curiae The New England Council, Inc.

The Foundation, due to its unique public interest perspective and established interest in First Amendment issues involving the New England business community, can provide the Court with a more complete argument of the issues in this case.

It is New England Legal Foundation's position that it is patently erroneous to uphold the decision of the Public Utility Commission of the State of New York (Commission) that public utilities do not have the right to disseminate information to the general public concerning the utility's ability to provide energy.

NELF is particularly concerned that the decision of the Court of Appeals of the State of New York will have a chilling effect on freedom of speech. The decision ignores the right of members of the public, including contributors of NELF, to hear the views of utilities on an issue: *i.e.*, energy, which substantially affects every person, corporate and individual, in New England. The effect of the decision of the New York Court of Appeals is to abridge the public's right to hear robust debate on a significant political and economic issue.

At a time when the nation, and New England in particular, is hampered by high energy costs, uncertainty of energy supply, a high unemployment rate and stagnant business development, it is particularly important for the public to hear all points of view on energy issues.

Members of the public are entitled to hear corporate viewpoints so as to have an opportunity to be fully informed. The right to hear uninhibited, wide-open debate, guaranteed by the First Amendment, is severely jeopardized by the Court of Appeals of New York.

For the foregoing reasons New England Legal Foundation respectfully requests permission to participate as amicus curiae and to file the attached brief in support of appellant.

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Brief of Amicus Curiae New England Legal Foundation in Support of Appellant.

Introductory Statement.

New England Legal Foundation, a non-profit corporation, broadly representative of New England interests, files this brief as amicus curiae in support of appellant.

Foremost, the brief discusses the serious infringement of the public's right to hear resulting from the order and decision of the Public Service Commission of the State of New York. The effect of the decision is to chill debate on an issue of great public importance. If the legislative and judicial actions challenged here are allowed to stand, legislatures could restrict the speech of all forms of corporate organizations and regulated industries by merely finding that particular matters involve "controversial" issues.

Public utilities and their consumers are confronted with increasing prices and shortness of supply. The issues facing the utility industry today include fuel shortages, coal conversion and the development of nuclear power to reduce the nation's debilitating dependence on foreign oil. Each of these issues is the subject of debate, not only by the legislative and executive branches of government but also by consumers. It is imperative that government be prohibited from stifling the free flow of information on issues of such importance; otherwise, intelligent self-government will be impossible.

New England Legal Foundation adopts appellant's description of the opinions, the order of the Public Service Commission of New York at issue and appellant's statement of the case.

Questions Presented.

New England Legal Foundation believes that this appeal presents the following issues:

1. Whether the order of the Public Service Commission of New York as upheld by the Court of Appeals of New York infringes upon the right of the public to hear.
2. Whether the Court of Appeals of New York erred in holding that the Commission's bill insert ban is not unconstitutionally vague.
3. Whether the Court of Appeals of New York erred in holding that the Commission's bill insert ban is not a content-based regulation.

Summary of Argument.

Any intrusion upon the right of free expression is so dangerous to full and free debate that this Court should overrule any attempt of state regulatory agencies to limit the right of parties to speak and the right of the public to hear. Particular points made in this brief are:

1. The right to hear free and unrestrained expression on matters of public concern is fundamental to this society. Any restriction upon free expression, however erroneous or disagreeable such expression may be, is abhorrent to the most treasured freedom upon which this country was founded. Even if it were so that the development of nuclear power was not favored by the Public Service Commission, the public has a right to know the position of utility corporations on this subject. If development of nuclear power is in its best interest, the public has a right to know because utility corporations may act upon their beliefs.
2. The standard for the Public Service Commission's ban is incapable of precise definition, vague and impossible to follow.
3. The Public Service Commission's ban is an unconstitutional prohibition against the content of speech. Logical extension of the principle involved in the ban would permit administrative rulings which could stifle free speech by all forms of corporations and regulated industries.

Argument.

I. The Right to Receive Information.

The New York State Court of Appeals in its decision upholding the order of appellee, Public Service Commission of

New York, failed to consider the right of the public to receive the information which would be enclosed in the appellant Consolidated Edison's bill inserts. See Appendix A, Appellant's Jurisdictional Statement (AJS).[1] It is well established that the First Amendment confers the right to receive information as well as the right to communicate. "The right of freedom of speech and press includes ... the right to receive, the right to read ...." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

The Supreme Court reaffirmed this basic concept in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), in which the right of the public to receive advertising concerning the price of prescription drugs was affirmed. This Court stated:

> Freedom of speech presupposes a willing speaker. But when a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. 425 U.S. at 756.

The Supreme Court has explicitly recognized that the First Amendment includes the right to receive information in a broad variety of contexts.[2] In *New York Times Co. v. Sul-*

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[1] This case was instituted by a complaint filed with the Public Service Commission of New York by Natural Resources Defense Council, Inc. (NRDC) objecting to a Consolidated Edison bill insert discussing the need for nuclear power. NRDC is a non-profit organization whose purposes include conserving natural resources. NRDC has been active in fighting nuclear proliferation.

[2] The First Amendment right to know has been recognized in the context of preventing censorship of literature. See, *e.g.*, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), acknowledging the right of the public to receive foreign literature, without the chilling effect of registering with the post office; *Minarcini v. Strongsville City School District*, 541 F. 2d 577 (6th Cir. 1976), preventing the banning of books in high school classes and libraries. See also, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), where the Court

livan, 376 U.S. 254 (1964), this Court interpreted the First Amendment to include equal protection for a person's right to know as much as for a person's right to speak. And in *Red Lion Broadcasting Co., Inc. v. FCC,* 395 U.S. 367 (1969), this Court, upholding the Federal Communications Commission's fairness doctrine which requires television and radio stations to provide reply time to individuals and organizations disagreeing with their editorials, stated:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. [Citations omitted.] It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. ... It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC. 395 U.S. at 390.

The First Amendment right to know has also been recognized in cases involving political speech. This Court has recognized that "[t]he public interest in having free and unhindered debate on matters of public importance" is "the core value of the Free Speech Clause of the First Amendment." *Pickering v. Board of Education,* 391 U.S. 563, 573 (1968). Similarly in *Garrison v. Louisiana,* 379 U.S. 64 (1964) the Court held:

> [S]peech concerning public affairs is more than self-expression; it is the essence of self government. The

recognized the right to receive obscene films; and *Procunier v. Martinez,* 416 U.S. 396 (1974), recognizing the right of individuals who wish to communicate with prisoners to receive the information contained in the writings of the prisoners.

> First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open ...." 379 U.S. at 74-75.

With such cases in mind a district court recently stated: "Free debate on public issues is essential to the survival of the Republic. It hardly needs repeating that such speech should be 'uninhibited, robust and wide-open.' " *Vanasco v. Schwartz,* 401 F. Supp. 87, 97 (S.D. N.Y. 1975), *aff'd,* 423 U.S. 1041 (1976).

This point was again emphasized in the context of political campaigns[3] in *Buckley v. Valeo,* 424 U.S. 1, 14 (1976) where the Court observed that discussion of political affairs is "an area of the most fundamental First Amendment activities," and "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."

The First Amendment guarantee of free speech, including the right to know, is designed to facilitate reasoned, informed self-government in a democratic society. This principle was recently reaffirmed in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

> Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and

[3] See also *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Pacific Gas and Electric Company v. Berkeley,* 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976); *C & C Plywood Corp. v. Hanson,* 420 F. Supp. 1254 (D. Mont. 1976), *appeal docketed,* No. 76-3118, 9th Cir. All involved corporate participation on referendum questions.

arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. 435 U.S. at 792.

In *First National Bank of Boston v. Bellotti,* the Court held unconstitutional a Massachusetts statute which prohibited corporations from making expenditures to influence the outcome of referenda, unless such questions "materially" affected the company's property, business or assets. The Court stated that the case involved "... the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation." 435 U.S. at 777.

In *Pickering v. Board of Education,* this Court held that the First Amendment protected the right of a school teacher to express his opinion on the wisdom of approving a bond issue for educational purposes.

> On such a question free and open debate is vital to informed decisionmaking by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. 391 U.S. at 571-72.

Similarly, appellant here is uniquely informed about the effect of nuclear generated electricity upon the New York ratepayer, and the effect it may have upon business desiring to locate in New York.

The decision by a utility to generate electricity by nuclear power is certainly a matter of concern to ratepayers. The public, including the ratepayers of New York, is intimately affected by the ability of utilities to provide adequate baseload electricity for heat and other necessities. Therefore,

the public has a vital interest in receiving information about how that power will be provided.[4]

The public's right to receive such information exists independent of whether the Public Service Commission decides that a particular issue is "controversial" or "noncontroversial." If utilities believe that the public perception of nuclear power will create a climate adverse to their interests, that belief may affect their ability to expand or even to maintain operations at current levels. The ratepayers are entitled to be informed of the concerns of the utilities in order to make informed, reasoned decisions on public issues.

Even assuming, *arguendo,* that Consolidated Edison's views on the desirability of nuclear power are wrong, there still would be no justification for preventing the public from hearing the utility's point of view. It is not relevant to the First Amendment whether a speaker's views are accurate. In his concurring opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* Mr. Justice Stewart drew a distinction between commercial price and product advertising, as to which factual advertising may be required, and ideological communications as to which accuracy may not be required.

> Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and in-

[4] For example, electricity in New England is generated principally by oil from foreign sources. In 1973 imported oil accounted for 34% of demand; in 1976 it accounted for 56%. Distillate fuel oil produced from foreign sources accounted for 65% of New England's needs and 71% of its gasoline in 1976. New England River Basins Commission, *New England Dependence on Petroleum Products* (1976). The development of nuclear power could reduce the reliance of New England ratepayers on foreign oil and the cost of energy.

dividual decisionmaking, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. Indeed, disregard of the "truth" may be employed to give force to the underlying idea expressed by the speaker. "Under the First Amendment there is no such thing as a false idea," and the only way that ideas can be suppressed is through "the competition of other ideas." 425 U.S. at 779-80.

The decision of the Court of Appeals of New York which seeks to keep the ratepayers ignorant of Consolidated Edison's views on political issues appears to be motivated solely by the fear that the utility's view might be accepted by the public. Such an approach is repugnant to the First Amendment. As the Supreme Court stated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*:

> There is, of course, an alternative to this highly paternalistic approach. [Preventing pharmacists from advertising the price of prescription drugs.] That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. ... But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. 425 U.S. at 770.

The speech proposed by Consolidated Edison is at the heart of the First Amendment.

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. ... Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. *Thornhill v. Alabama,* 310 U.S. 88, 101-102 (1940).

The public in general has a particular interest about the views of utility companies on the adequacy of energy supply. The fact that utilities operate in a non-competitive market is simply irrelevant. AJS App. A, p. 12a. In these days of rapidly increasing energy prices the free flow of information from Consolidated Edison to its ratepayers could mean the difference between having or not having basic necessities. Without question, inadequate supplies are an exigency of this period.[5]

In *First National Bank of Boston v. Bellotti,* this Court ruled that corporate speech is entitled to First Amendment protection, even when such speech deals with matters *unrelated* to the corporation's business interests. In the free discussion of governmental affairs, the nature of the speaker is not constitutionally significant. The Court noted that

> [t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual. 435 U.S. at 777.

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[5] The New York Court of Appeals underestimates the value of information contained in the bill inserts to informed public decision making: "At best consumers might seek, through the Public Service Commission to limit future increases in electrical prices." AJS App. A, p. 15a. Limiting increases in electrical prices would be no small accomplishment given energy shortages and the fact that electricity is a necessity.

In its bill inserts, Consolidated Edison informs customers of the advantages of nuclear power and of its decision to develop such power. This is an issue intimately related to Consolidated Edison's business. And the information Consolidated Edison seeks to disseminate is "political" in nature: "... speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. at 74-75.

It is clear then, that the debate on nuclear power is precisely the kind of speech that the First Amendment is designed to protect and that Consolidated Edison's right to communicate on this "controversial matter" is entitled to First Amendment protection. Protection of the public's right to hear uninhibited, robust and wide-open debate requires reversal of the decision of the New York State Court of Appeals and a declaration that the ruling of the Public Service Commission, here in issue, is unconstitutional as repugnant to the First Amendment.

II. The Commission's Bill Insert Ban Is Unconstitutionally Vague.

Appellee contends that the Commission's bill insert ban is sufficiently specific to avoid violating the Fourteenth Amendment. Appellee's Motion to Dismiss Appeal or Affirm Judgment Below, 17-19. It is a fundamental principle of Due Process that a statute is unconstitutionally vague if the conduct it prohibits is not clearly defined. *Buckley v. Valeo, supra,* 424 U.S. at 40-41; *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). It is also a fundamental rule of law that "stricter standards of permissible ... vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here,

because the free dissemination of ideas may be the loser." *Smith v. California,* 361 U.S. 147, 151 (1959).

In *Grayned v. City of Rockford,* this Court reviewed the problems created by vaguely drawn statutes:

> ... Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." 408 U.S. at 108-109.

As this Court recently stated in *First National Bank of Boston v. Bellotti:*

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. 435 U.S. at 784-785.

Thus the constitutionality of the Commission's ban on bill inserts depends upon whether its ruling can withstand the exacting scrutiny necessitated by the restrictions it imposes on freedom of speech. Here, where the prohibition is directed at speech itself, and the speech is intimately related to the pro-

cess of governing, the state may prevail only upon showing a subordinating interest which is compelling. *Bates v. Little Rock,* 361 U.S. 516, 524 (1960); *N.A.A.C.P. v. Button,* 371 U.S. 415, 438-439 (1963).

Further, New York bears the burden of showing the existence of a compelling state interest in regulating the speech at issue, *Elrod v. Burns,* 427 U.S. 347, 362 (1976). And the state must employ means "closely drawn to avoid unnecessary abridgment." *Buckley v. Valeo, supra* at 25.

The Public Service Commission of New York provided absolutely no standards to guide appellant on the use of bill inserts. The Commission's order states:

> . . . [we] . . . order all utilities to discontinue the practice of utilizing bill inserts as a mechanism for the dissemination of a utility's position on controversial matters of public policy. AJS App. F, p. 58a.

The standard imposed, *i.e.,* "controversial matters of public policy" is excessively vague. Its application leads to no discernable result. The pre-publication factual judgment the utility is required to make is incapable of precise definition, and cannot be made with certainty.

The subjective and imprecise nature of the ban is evident in the reasoning of the Commission. The Commission argues that:

> The expression of a utility's views on a controversial issue may truly reflect its concern for the welfare of its consumers and may make a genuine contribution to a public policy debate; but we believe that it is basically unfair to assess against ratepayers the cost of advertisements urging the adoptions of positions with which they may disagree. AJS App. E, p. 42a.

The Commission further states:

> We include in this category expenses designed to influence public opinion in the current debate concerning the development of nuclear power. AJS App. E, p. 43a.

Practical difficulties with the standard abound. First, in the 1950's and 60's, nuclear power was not a "controversial

issue." Its virtues as a cheap, clean, virtually limitless source of power were extolled by utilities, regulators, politicians and the general public alike. Will nuclear power become "non-controversial" if there is another oil embargo?

The New York Supreme Court, Appellate Division[6] also experienced difficulty with the Commission's standard:

> We have little doubt that the PSC and the utilities are capable of distinguishing *useful* information for consumers (e.g., ways to conserve energy) from management's statement on the political issues of the day (e.g., benefits of nuclear power). AJS App. B, p. 19a. (Emphasis added.)

The Appellate Division offers no explanation of why information about the development of nuclear power cannot be both "useful" and "political." Yet considering the effect of the development of nuclear power on the ratepayers such information is clearly useful and considering the extensive national debate on the subject it is clearly political.

In fact the Court substituted an imperfect standard ("useful") for the Commission's already unconstitutionally vague ("controversial") standard. Neither term is immutable; neither provides guidance as to what is permitted and what is not. The Court's standard is not only vague, it is impossible to apply in advance of regulatory and judicial interpretation.

The regulators and the regulated will have to determine on a case by case basis what is "useful" or "non-controversial" information. In each instance, the Commission's decisions as to which issues are controversial will depend upon the Commission's subjective application of an imperfect and im-

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[6] The opinion of the Court of Appeals of New York does not discuss appellant's claim of vagueness but implicitly sustained the Appellate Division in this regard. See AJS, App. A, p. 1a-16a.

precise standard. This is precisely the situation which the First and Fourteenth Amendments are designed to prevent.

Finally, the Commission's ruling as upheld by the Court of Appeals will have, and has had, a chilling effect on speech. The Commission states:

> Thus far, the Commission has only had occasion to consider two issues with respect to its ban . . . the current debate concerning the development of nuclear power and questions concerning the merits of public versus private ownership of electric utilities. In the more than two years since the . . . ban has been in effect, there have been no problems concerning its implementation. Appellee's Motion to Dismiss Appeal or Affirm Judgment Below, p. 17.

The fact that a regulatory agency has experienced no problems imposing censorship on the industry it regulates is hardly surprising. Faced with omitting bill inserts, charging investors for bill inserts or using more expensive means of publicizing its views, Consolidated Edison simply did nothing. The Commission's frontal assault on freedom of speech has resulted in isolating the ratepayer from the single, most important source of relevant information on energy matters, the utility.

The Commission's standard simply cannot withstand the exacting scrutiny required by the First and Fourteenth Amendments. The standard inhibits the exercise of basic First Amendment freedoms and provides no guidance regarding the parameters of the zone of permissible speech.

III. The Commission's Bill Insert Ban Is a Content Related Regulation.

The Commission's ban is a classic example of a content based restriction. Consolidated Edison is permitted to utilize

bill inserts which address conservation and encourage "development" of off-peak loads, which could lessen the country's dependency on foreign oil. AJS App. A, p. 5a. Consolidated Edison is not permitted to discuss nuclear power as a conservation mechanism, despite the fact that increased utilization of nuclear fuel might also lessen the nation's dependency on foreign oil.

In support of its ban on "controversial" matters of public policy on bill inserts the Commission states:

> We realize, too, that a continued ban on promotion of off-peak electric usage may aptly be described as piecemeal conservationism. . . . Nevertheless conservation of energy remains our highest priority. AJS App. E, p. 36a.

This reasoning is constitutionally infirm. Because the Commission has set conservation as a goal, the Commission bans speech making a certain position. In essence, the Commission views discussion of nuclear power as synonomous with a "false," "wrong" or "bad" idea.[7] Any government effort to suppress speech because the government does not agree with the idea communicated, and does not trust the individual recipient to decide wisely, is plainly inconsistent with the First Amendment:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford

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[7] See generally, Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978).

all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. *Police Department of the City of Chicago v. Mosley,* 408 U.S. 92, 96 (1972).

Where there is regulation of the content of speech there is a "... need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." *Young v. American Mini Theaters, Inc.,* 427 U.S. 50, 67 (1976).

It is apparent not only that Consolidated Edison and the Commission will (and have) experienced great difficulty in categorizing particular matters as controversial, but also that, in large part, the ultimate determination as to what is controversial is left to special interest groups such as NRDC, Inc. Here the government has acted on the complaint of NRDC, Inc., an avowed anti-nuclear group, to restrict speech about nuclear power. These proceedings were instituted by NRDC, Inc., not the Commission. Thus, the constitutional error is compounded. The Commission not only accepted the viewpoint of one group, it acted to silence opposing views.

The vagueness of the Commission's ruling and its interpretation by the New York Court of Appeals indicates a hostility for Consolidated Edison's views. The regulation does not define speech in terms of time, place and manner but in terms of subject matter.[8] The regulation " '... thus slip[s]

[8] A valid time, place and manner restriction must be content neutral, supported by significant government interest and not foreclose alternate channels of communication. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771 (1976).

from the neutrality of time, place and circumstance into a concern about content.' " *Police Department of the City of Chicago v. Mosley, supra* at 99. The fundamental underpinnings of the First Amendment are jeopardized by this ill-conceived attempt to isolate ratepayers from the political process.[9] In *Roth v. United States,* 354 U.S. 476, 484 (1957) the Court stated that, "[the Constitutional safeguard] was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

There is simply no factual basis for the assertion that "no one viewpoint is singled out for special treatment ...." AJS App. A, p. 9a. The opposite is true. The Commission's order was spawned by a complaint about the utility's view on nuclear power. Nuclear power is the controversial issue of public importance which is singled out for special treatment. AJS App. 6, p. 25a.

In *Police Department of the City of Chicago v. Mosley,* this Court struck down a city ordinance prohibiting picketing within 150 feet of a school but excepting peaceful picketing of any school involved in a labor dispute, because the ordinance was directed at the content of speech. The Court said: "The operative distinction is the message on a picket sign." 408 U.S. at 95. Similarly, here, the restriction is on the content of speech. "Controversial" messages are banned, "non-contro-

[9] Neither is this a captive audience case. The captive audience doctrine involves coercion: "While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it," *Lehman v. City of Shaker Heights,* 418 U.S. 298, 307 (1974). Here the recipient can discard the bill insert; he is not a captive. See also *Public Utilities Commission v. Pollak,* 343 U.S. 451, 468-69 (1952) (Douglas, J., dissenting opinion), and Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor,* 43 Colum. L. Rev. 960 (1953).

versial" and "useful" messages are permitted. The ban is imposed without regard to time, place or manner. *Kovacs v. Cooper,* 336 U.S. 77 (1949). Restrictions on speech based solely on the content of speech, even if applied in "an objective and evenhanded" manner are nothing more than censorship.

Under this approach the state or an administrative agency may override the First Amendment simply by banning all speech on a hotly debated issue. Any attempt by government to suppress debate usurps the right of the people to make decisions for themselves, distorts the marketplace of ideas and makes intelligent, self-government impossible. The First Amendment is plainly offended.

Conclusion.

The right to think, speak and write freely without government or special interest group censorship is the essence of citizenship. Any form of censorship, under whatever guise presented, reveals a fear that citizens cannot think for themselves, and perhaps more important, that the public may reach a different conclusion than the censor would have it reach.

As Justice Black once stated: "It is not difficult for ingenious minds to think up and contrive ways to escape even the plain prohibitions of the First Amendment."[10] It is evident from the record that this case is one more battleground in the continuing fight for the mind of the citizen. Under pretense of protecting ratepayers from hearing information about the "controversial" subject of nuclear power, the State of New York has prohibited speech on the subject. The issue here is not the development of nuclear power versus conservation, the issue is whether a state regulatory agency may, on the complaint of some citizens, silence debate among all citizens.

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[10] Black, Hugo LaFayette, *A Constitutional Faith* (Alfred A. Knopf, New York 1968).

Protection of political and public expression is fundamental. If one entity is prevented from expressing itself because it is a regulated industry, or because the state disagrees with its view, there is a grave danger that restrictions upon the free expression of ideas may be applied to other entities. Charities may be limited in their expressions to matters which the legislature deems to be within their charitable purposes; special interest groups receiving contributions and conducting their affairs as corporations may be subjected to legislative determinations as to matters upon which they may appropriately speak. The power of the legislature may not be used to silence opposition, to suppress minority viewpoints. The public's right to hear is plainly offended by the power of government to channel the expression of views.

The danger that this case presents to informed decision-making requires a firm pronouncement by this Court upholding the public's First Amendment right to hear wide-open, robust debate so that effective government is not impaired.

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Dated November 15, 1979.